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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LOUIS ROGER ACOSTA, JR.,

Defendant and Appellant.

G047370

(Super. Ct. No. 06ZF0131)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

Louis Roger Acosta, Jr., appeals from a judgment after the trial judge, at a bench trial, convicted him of murder during the commission of rape pursuant to Penal Code sections 187, subdivision (a)<sup>1</sup> and 190.2, subdivision (a)(17)(C), and sentenced him to prison for life without the possibility of parole. Acosta claims that because the trial judge did not specify a degree of murder, we must reduce his conviction to second degree murder. We disagree and affirm the judgment.

### FACTS

Dung Duong owned and operated a convenience store, D and D Market (the Market). Duong would sometimes stay overnight in her store. One summer morning, Sergeant Thomas Mathisen and another officer responded to an unknown trouble call at the Market. After finding both the security door and the glass door closed but unlocked, Mathisen and the other officer entered the store. Upon entry, the officers discovered a female, later identified as Duong, behind the cashier counter. Duong was naked from the waist down, lying in a pool of blood, and surrounded by bloody shoe prints.

Anaheim Police Officer James Conley also responded to the Market. Conley found a bag of cash sitting on the counter and blood splatter marks around Duong's body. Conley photographed the shoe prints throughout the Market and concluded all the shoe prints, made by a "boot-type shoe," were consistent with having been made by one person. Duong was found lying on her back behind the counter near her makeshift bed. Duong was wearing a nightgown, her legs were spread apart and bruised, she had several injuries around her head, and she was nude from the waist down. There were also bloody pieces of a broken massage vibrator found near Duong's body.

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<sup>1</sup>

All further statutory references are to the Penal Code.

Anthony Juguilon, a forensic pathologist, testified concerning the autopsy results. Duong sustained at least 35 puncture type wounds around her face, multiple contusions and lacerations involving her head, face, and neck, a fractured nasal bridge, and one severe contusion around her right eye. Duong sustained multiple abrasions on her upper chest and contusions on her upper extremities consistent with self-defensive injuries. Duong also had multiple contusions on both of her legs, and a fracture near her left hip. She had a scratch on the exterior of her vaginal area and redness around her anus that were consistent with sexual assault; either forced penile penetration or penetration with a foreign object. Juguilon opined Duong died of excessive blood loss due to the multiple blunt traumatic injuries to her head and face region.

Employees of the Orange County Crime Lab collected 17 swabs from Duong's mouth, breast, vaginal, and anus areas. Forensic testing revealed high amounts of semen with sperm were present on the swabs from both the vaginal and anus area. DNA analysis of the swabs collected from Duong at the crime scene revealed the sperm and semen came from one source.

Over three years later, police in the state of Washington detained Acosta for matters unrelated to this case. Officers collected numerous items of clothing, including shoes. A few years later, Conley located Acosta's shoes in the Anaheim Police Department property room.<sup>2</sup> Conley photographed the shoes and compared them to the shoe prints found at the crime scene. After studying the size, pattern, and wear of Acosta's shoes, Conley concluded the impressions made at the crime scene were consistent with Acosta's shoes.

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<sup>2</sup> The evidence concerning Acosta's arrest in Washington was presented by way of a stipulation. The record does not indicate how Conley, who was investigating the case, made the connection between the boots recovered from Washington and this case.

Acosta provided law enforcement officials with a blood sample. Forensic testing revealed Acosta's DNA was consistent with the DNA found in the sperm and semen in Duong.

In 2006, the grand jury indicted Acosta for the murder (§ 187, subd. (a)) during the commission of rape (§ 190.2, subd. (a)(17)(C)) (count 1). The prosecutor notified Acosta that he intended to seek the death penalty. Six years later, after many continuances, the prosecutor withdrew his intention to seek the death penalty and both parties waived the right to a jury trial. The same day, a court trial commenced and the prosecutor presented his witnesses. The trial judge found Acosta guilty of count 1 and found the special circumstance to be true.

The trial judge sentenced Acosta to prison for life without the possibility of parole. The judge explained: "The penalty for violating . . . section 187[, subdivision](a), *murder in the first degree*, is an indefinite term of 25 years to life in state prison. The special circumstance of rape during the commission of a murder under section 190.2[, subdivision] (a)(17)(C) that the court found to be true requires that the term of life without the possibility of parole be imposed and that probation be denied. Therefore, on count 1 [Acosta] is sentenced to a term in state prison of life without the possibility of parole." (Italics added.)

## DISCUSSION

Acosta argues the trial judge erred in not fixing a degree of murder when it found Acosta guilty of murder. As we explain below, although the judge was not required to fix a degree for the murder conviction, the judge did so at the sentencing hearing.

Section 1157 states: "Whenever a defendant is convicted of a crime or attempt to commit a crime which is distinguished into degrees, the jury, or the court if a jury trial is waived, must find the degree of the crime or attempted crime of which he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime

or attempted crime of which the defendant is guilty, shall be deemed to be of the lesser degree.” Section 1192 provides: “Upon a plea of guilty, or upon conviction by the court without a jury, of a crime or attempted crime distinguished or divided into degrees, the court must, *before passing sentence*, determine the degree. Upon the failure of the court to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deemed to be of the lesser degree.” (Italics added.) *People v. Mendoza* (2000) 23 Cal.4th 896 (*Mendoza*), is instructive.

In *Mendoza, supra*, 23 Cal.4th at pages 903 to 904, a jury convicted defendants of murder without specifying the degree but also found true the special circumstance that it was committed during a robbery. On appeal, defendants, citing section 1157, contended their convictions had to be reduced to second degree murder because the jury did not specify the degree. The Supreme Court held: “[W]e conclude that defendants were not ‘convicted of a crime . . . which is distinguished into degrees’ within the plain and commonsense meaning of section 1157 . . . . When the prosecution establishes that a defendant killed while committing one of the felonies section 189 lists, ‘by operation of the statute the killing is deemed to be first degree murder as a matter of law.’ [Citations.] Thus, there are no degrees of such murders; as a matter of law, a conviction for a killing committed during a robbery or burglary can *only* be a conviction for first degree murder.” (*Id.* at p. 908.)

Here, when the trial judge, sitting as the trier of fact, rendered his verdict, the judge did not err when he failed to articulate a degree to the murder charge because he found Acosta was guilty of felony murder. Similar to the defendant in *Mendoza*, Acosta committed murder during the commission of rape. By statute, this was first degree murder. (§ 189.) Contrary to Acosta’s contention otherwise, the judge did not imply a degree because the court did not need to imply one—it was first degree murder or nothing. Although *Mendoza* involved a jury trial, nothing in *Mendoza* indicates the same reasoning would not apply to a bench trial.

Additionally, at the sentencing hearing, the trial judge stated Acosta violated “section 187[, subdivision](a), *murder in the first degree.*” Thus, the trial judge fixed the murder conviction as first degree murder before sentencing Acosta to prison for life without the possibility of parole. (§ 1192 [court must determine degree “before passing sentence”]; *People v. Deay* (1987) 194 Cal.App.3d 280, 285 & fn. 4.)

Acosta relies on *People v. Williams* (1984) 157 Cal.App.3d 145, a special circumstance murder case to support his contention the trial judge erred in failing to specify a degree to the murder charge. Aside from the fact the intermediate appellate court case predates the California Supreme Court’s decision in *Mendoza*, as we explain above, the trial judge here fixed a degree before passing sentence.

Acosta’s reliance on *People v. Beamon* (1973) 8 Cal.3d 625 (*Beamon*) and *People v. Thomas* (1978) 84 Cal.App.3d 281(*Thomas*), is misplaced. Neither case involved felony murder but instead robberies that could be divided into degrees. (*Beamon, supra*, 8 Cal.3d at p. 629; *Thomas, supra*, 84 Cal.App.3d at p. 285.) Acosta’s felony murder conviction could not be divided into degrees; it was first degree murder.

#### DISPOSITION

The judgment is affirmed.

O’LEARY, P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.